

91-914

No.

Supreme Court, U.S.
FILED

DEC 12 1991

OFFICE OF THE CLERK

IN THE
Supreme Court Of The United States

October Term, 1991

LIH Y. YOUNG,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Victor H. Lee
BITONTI & WILHELM, P.C.
2010 Corporate Ridge, Suite 410
McLean, Virginia 22102
(703) 749-4055

Counsel for Petitioner



QUESTIONS PRESENTED FOR REVIEW

1. Did the Secretary of the Department of Health and Human Services violate 29 C.F.R. Part 1613 by failing to fully and properly process Petitioner's complaint alleging Title VII violations?

2. Whether the alleged improper acts in processing of Petitioner's complaint are separate discriminatory acts that could be presented by Petitioner as a basis for a claim of discrimination under Title VII.



LIST OF PARTIES

The parties to this petition are the same as the parties to the appeal and civil action below.

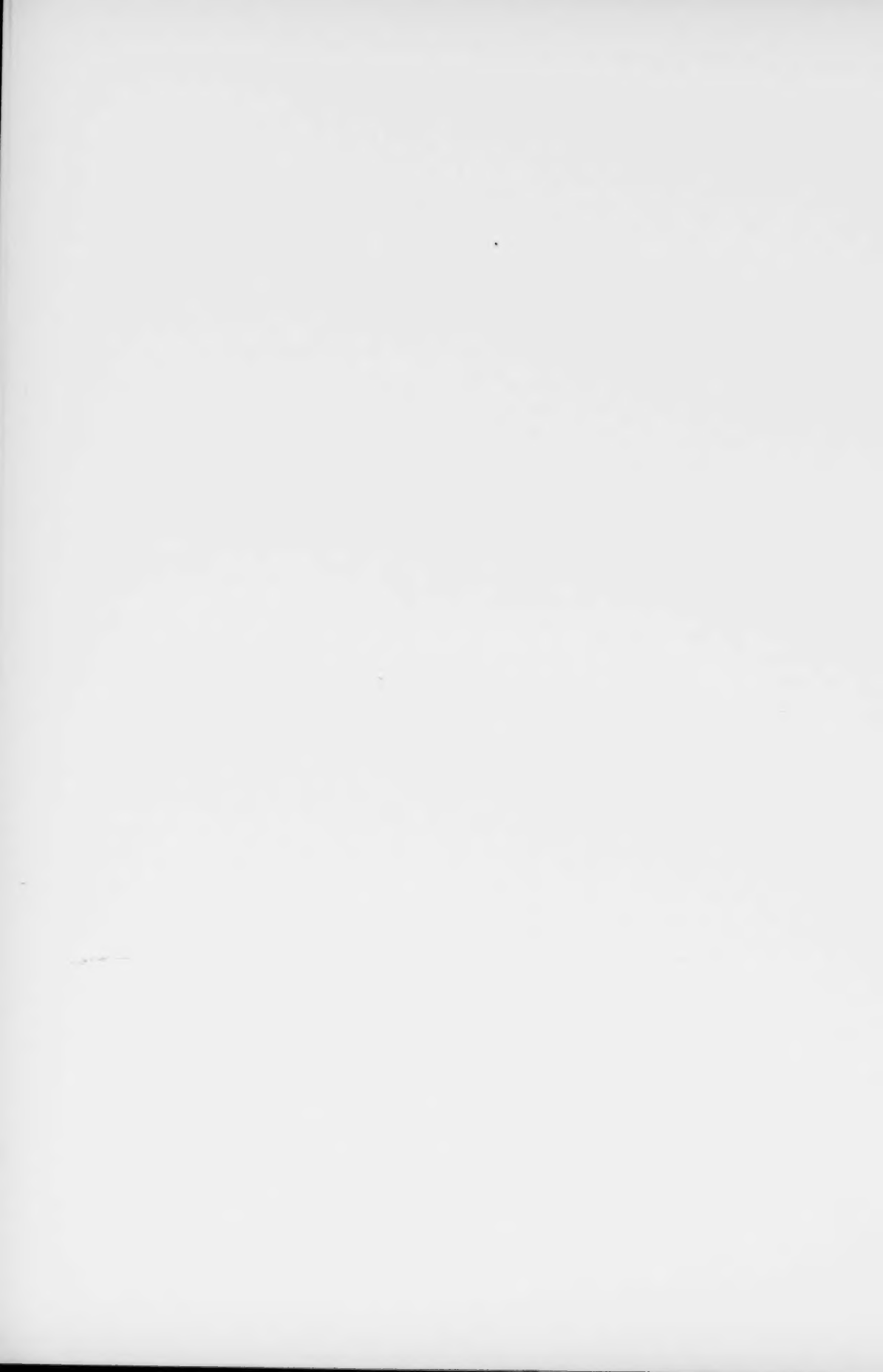


TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	3
STATUTES INVOLVED	3
STATEMENT OF THE CASE	7
REASONS FOR GRANTING A HEARING:	
I. The Secretary of the Department of Health and Human Services failed to fully and properly process Petitioner's complaint in violation of 29 C.F.R.·Part 1613	15
II. The improper acts in processing of Petitioner's complaint should be viewed as separate discriminatory acts that could be presented by Petitioner as a basis for a claim of discrimination under Title VII	27

CONCLUSION	40
APPENDIX	
Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing, entered September 19, 1991.	A-1
Order of the United States Court of Appeals for the District of Columbia Circuit Denying Suggestion for Rehearing <u>En Banc</u> , entered September 19, 1991.	A-3
Order of the United States Court of Appeals for the District of Columbia Circuit affirming the decision of the United States District Court for the District of Columbia, entered June 28, 1991.	A-5
Memorandum of Opinion and Order of the United States District Court for the District of Columbia dismissing the action on the basis of <u>res judicata</u> , entered June 6, 1990.	A-8
Amended Memorandum of Opinion and Order of the United States District Court for the District of Columbia correcting typographical errors in	A-13

the February 21, 1990
Memorandum of Opinion,
entered March 19, 1990.

Memorandum of Opinion
and Order of the United
States District Court
for the District of
Columbia dismissing
the action as to one
of the defendants
and granting Respondent's
motion to dismiss the
allegations relating
to the mishandling of
Petitioner's complaint,
entered February 21, 1990
(superseded by Amended
Memorandum of Opinion
and Order at p. A-13).

A-18

Decision of the United
States Equal Employment
Opportunity Commission
affirming the decision of
the Department of Health
and Human Services to
reject Petitioner's
complaint, entered
June 28, 1989.

A-23

Decision of the Department
of Health and Human
Services rejecting
Petitioner's complaint,
entered February 10, 1989.

A-38

Letter from Department
of Health and Human
Services acknowledging

A-52

18 issues to consider
plus attachment,
dated October 5, 1988.

EEO-MD107, Sections 2.2
and 2.5(c), dated 9/87.

A-60

Summary of Petitioner's
Complaints.

A-65 -

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>Alexander V. Gardner-Denver Co.,</u> 415 U.S. 36 (1974)	16
<u>Anthony v. Bowen,</u> No. 86-5473, slip op. (D.C. Cir. Mar. 5, 1987)	18
<u>Carson v. American Brands, Inc.,</u> 450 U.S. 79 (1981)	15
<u>Clemente v. United States,</u> 36 Fair Empl. Prac. Cas. (BNA) 1713 (C.D. Cal. 1980)	27
<u>Cosgrove v. Bolger,</u> 775 F.2d 1078 (9th Cir. 1985)	27
<u>Hall v. EEOC,</u> 456 F. Supp. 695 (N.D. Cal. 1978)	33
<u>Hutchings v. United States</u> <u>Industries, Inc.</u> 428 F.2d 303 (5th Cir. 1970)	16
<u>United States v. Allegheny-Ludlum</u> <u>Industries, Inc.,</u> 517 F.2d 826 (5th Cir. 1975)	16

<u>Statutes:</u>	<u>Page</u>
28 U.S.C. § 1254(1)	3
28 U.S.C. § 1343(a)(4)	13
28 U.S.C. § 2412	39
Civil Rights Act of 1964, 42 U.S.C. § 2000e <u>et. seq.</u>	13, 15
<u>Regulations:</u>	
Equal Employment Opportunity in the Federal Government, 29 C.F.R. Part 1613 (1991)	passim
<u>Other Authorities:</u>	
EEO-MD107	20, 23, 24, 35
EEO-MB107	38

OPINIONS BELOW

The Order of the United States Court of Appeals for the District of Columbia Circuit affirming the decision of the United States District Court for the District of Columbia is reprinted in the Appendix at p. A-5. The Orders of the United States Court of Appeals for the District of Columbia Circuit denying Petitioner's request for rehearing and Petitioner's suggestion for rehearing en banc are reprinted in the Appendix at p. A-1 and p. A-3, respectively. The Memorandum of Opinion and Order of the United States District Court for the District of Columbia dismissing a portion of Petitioner's action on the basis of res judicata is reprinted in the Appendix at p. A-8. The Amended Memorandum of Opinion and Order of the United States District

Court for the District of Columbia correcting typographical errors in the February 21, 1990, Memorandum of Opinion is reprinted in the Appendix at p. A-13. The Memorandum of Opinion and Order of the United States District Court for the District of Columbia dismissing the action as to one of the defendants and granting Respondent's motion to dismiss the allegations relating to the mishandling of Petitioner's complaint is reprinted in the Appendix at p. A-18. None of the foregoing opinions or orders have been published. The Decision of the United States Equal Employment Opportunity Commission affirming the decision of the Department of Health and Human Services to reject Petitioner's complaint is reprinted in the Appendix at p. A-23. The Decision of the Department of Health and Human

Services rejecting Petitioner's complaint is reprinted in the Appendix at p. A-38.

JURISDICTION

The judgment sought to be reviewed was a denial of a petition for rehearing by the United States Court of Appeals for the District of Columbia Circuit, dated and entered on September 19, 1991. This petition is being filed within the time required pursuant to Rule 13 of the rules of this Court. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The issues in this Petition involve the general policy behind Title VII

actions and the specific interpretation of the following sections of 29 C.F.R. Part 1613:

§ 1613.212 Coverage.

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, national origin, age or handicapping condition. A complaint may also be filed by an organization for the aggrieved person with that person's consent.

§ 1613.215 Rejection or cancellation of complaint.

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency; . . .

(3) That is the basis of a pending civil action in a United States District in which the complainant is a party; . . .

§ 1613.216 Investigation.

(a) The Equal Employment Opportunity Officer shall advise the Director of Equal Employment Opportunity of the acceptance of

a complaint. The Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statements of witnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which

the - alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, - or appear to constitute, discrimination even though they have not been expressly cited by the complainant...

STATEMENT OF THE CASE

Petitioner is a female of Chinese national origin. Petitioner is a former employee of the U.S. Department of Health

and Human Services. Petitioner had worked for the National Center for Health Services Research from December 3, 1978 to March 19, 1984, and for the Office of Family Assistance from April 30, 1984 to June 13, 1986. On January 27, 1984, Petitioner received her first EEO counseling based upon an allegation by Petitioner of employment discrimination based upon race and national origin. Over the course of the past seven and one-half years, Petitioner has filed seven different complaints. (See p. A-65 for a brief summary) At first glance, it would appear that Petitioner has initiated an inordinate number of complaints. Upon a close examination of the facts and circumstances, it is evident that Petitioner filed the complaints in response to inaction and action by

Respondent and in order to help protect her rights. Over the years, Petitioner has had her complaints rejected, cancelled, closed, consolidated, modified, fragmented and even ignored.

The complaint at issue before this Court is OSH-82-89 which was initially filed on June 30, 1988.¹ Respondent initially did not assign a complaint number to this matter and refused to provide an EEO counseling report. On November 16, 1988, Petitioner refiled the complaint and it was assigned a complaint number without an EEO counseling report. It is undisputed that Petitioner timely filed her complaint OSH-82-89. Petitioner

¹Petitioner made 18 allegations in her complaint, the attachment of which is reprinted in the Appendix at pp. A-54 through A-59. Issues 12-18 alleged, among other things, improper processing of complaints.

also attempted to respond to all requests made by Respondent to clarify her complaint. By its own correspondence of October 5, 1988, Respondent, through EEO counselor Ann Garrett, acknowledged receipt of 18 issues from Petitioner. (See pp. A-52 and A-53) Petitioner received notice that her complaint was officially filed on November 21, 1988.

Respondent rejected all of Petitioner's issues in its Decision, dated February 10, 1989. (See p. A-38) In issuing its Decision to reject all of Petitioner's allegations, Respondent consolidated Petitioner's allegations 12-18, as the main portion of Respondent's Issue/Allegation No. 11.² (Compare pp. A-57 and A-58 with p. A-45) Not only did

²The first clause of Respondent's Issue/Allegation No. 11 is Petitioner's allegation 11.

Respondent rephrase and consolidate these issues, but Respondent completely omitted Petitioner's allegation 14.³ Respondent did not inform Petitioner or explain to Petitioner why it omitted Petitioner's allegation 14. Respondent's explanation in its decision for rejecting Issue/Allegations Numbers 9 through 11 was that "[these issues] are "spin-offs" of complaints previously filed by [Petitioner]." (See pp. A-46 and A-47)

Petitioner timely appealed Respondent's decision to the EEOC. (See p. A-24) On appeal to the EEOC, Petitioner alleged, inter alia, that Respondent failed to fully and properly address all the issues raised in Petitioner's complaints, especially issues 12-18.

³Allegation 14 of Petitioner's complaint alleges "Arbitrary closing of complaints . . ." (See p. A-57).

Petitioner indicated that Respondent had improperly consolidated issues 11-18 of Petitioner's complaint into one Issue No. 11 in its Decision. The documents indicate that in fact, Respondent had consolidated seven distinct allegations of Petitioner into this one issue and completely ignored allegation 14 of Petitioner's complaint. (See p. A-45)

The EEOC Decision, dated June 28, 1989, affirmed Respondent's decision but on different grounds. The EEOC decision stated that Petitioner failed to state a claim. (See p. A-32) While affirming Respondent's decision, the EEOC noted "that the case record contains no evidence of [Petitioner's] prior complaints or of the issues in these complaints." (See p. A-31) The EEOC also stated, "[a]dditionally, there is no evidence of

the pending civil action in the case record." (See pp. A-31 and A-32) The EEOC affirmed Respondent's decision without the benefit of a thorough investigation or consideration of all the relevant facts relating to the other complaints or pending cases.

Petitioner timely brought an action to review these decisions in the U.S. District Court for the District of Columbia. Jurisdiction was proper pursuant to 42 U.S.C. 2000e-5, 2000e-16(c) and 28 U.S.C. 1343(a)(4). Petitioner was pro se before the District Court.

With respect to the issue before this Court, the District Court ruled that Petitioner's claim was barred by res judicata. (See p. A-12) In dismissing the action, the District Court stated that Petitioner's "opposition papers make no

attempt to articulate the facts or legal theories which [Petitioner] vaguely asserts are "distinct" from those in the 1988 action."⁴ (See pp. A-11 and A-12)

Acting pro se, Petitioner appealed the District Court's judgment to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the District Court's

⁴District Court Case No. 88-0004 also involved Petitioner and Respondent but related to four other complaints. The District Court found no discrimination occurred. This decision is final. This case was also before Judge George H. Revercomb. Respondent asserts that this case addressed Petitioner's improper processing claims on the merits. In his District Court decision (See p. A-8) for the case before this Court, Judge Revercomb dismissed Petitioner's action but did not address any specific facts or circumstances of the pleadings or transcript for Case No. 88-0004. Without specific explanation, Judge Revercomb barred the issues before the District Court on the grounds of res judicata.

decision and later denied Petitioner's petition for rehearing and suggestion for rehearing en banc. (See pp. A-1 through A-4)

REASONS FOR GRANTING A HEARING

I. The Secretary of the Department of Health and Human Services failed to fully and properly process Petitioner's complaint in violation of 29 C.F.R. Part 1613.

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et. seq. and the EEOC's regulations at 29 C.F.R. Part 1613 are designed to encourage full and fair administrative proceedings that reveal the basic facts and issues in a complaint so that differences may be amicably resolved as quickly as possible without burdening the federal courts with unnecessary litigation. Carson v. American Brands, Inc., 450 U.S. 79, 88,

n.14 (1981) ("In enacting Title VII, Congress expressed a strong preference for encouraging voluntary settlement of employment discrimination claims."); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974) ("Cooperation and voluntary compliance were selected [by Congress] as the preferred means for achieving [Title VII's] goal[s].").⁵ This goal is apparent in the EEOC's regulations for federal sector complaints. The EEOC regulations prescribe a complete administrative procedure with investigations, hearings and appeals. See generally, 29 C.F.R. Part

⁵United States v. Allegheny-Ludlum Industries, Inc., 517 F.2d 826, 847 (5th Cir. 1975), cert. denied, 425 U.S. 944 (1976) (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); Hutchings v. U.S. Industries, 428 F.2d 303, 309 (5th Cir. 1970) (" . . . Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation. . .").

1613. The EEOC regulations also prescribe efforts toward conciliation and resolution. See 29 C.F.R. §§ 1613.213 and 1613.217.

The appropriate administrative process involved in federal employment discrimination complaints is set out in 29 C.F.R. Part 1613. These regulations require federal agencies to review complaints by employees and accept or reject for investigation any matters raised by the complaint. See generally, 29 C.F.R. §§ 1613.214-216. The regulations set out the only reasons for which a complaint may be rejected. 29 C.F.R. § 1613.215. The regulations also require that "[t]he investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred..." See 29 C.F.R. § 1613.216.

The agency involved must decide whether to reject or accept the matters raised in the complaint; "[w]here, as here, the complainant's allegations are discernible, the agency must attend to those allegations." Anthony v. Bowen, No. 86-5473, slip op. at 3 (D.C. Cir. Mar. 5, 1987).

If the matters raised by the complaint do not fit into one of the categories requiring rejection, Respondent must investigate them. An agency may not merely ignore allegations, as Respondent did in this case. In failing to address and properly process all of Petitioner's complaint, Respondent acted in abuse of its authority. Respondent is reminded that it should construe administrative complaints liberally. See Anthony, slip op. at 2. Petitioner was pro se. If

Respondent finds it must reject the previously unaddressed issues, the agency should put its reasons for doing so on the record. By ignoring and consolidating matters presented by Petitioner and restrictively interpreting her complaint, Respondent deprived Petitioner of an investigation into and hearing on the merits of her claims and in the process also deprived her of one of the mandated opportunities at conciliation. See 29 C.F.R. § 1613.217. Respondent has encouraged piecemeal litigation of Petitioner's claims and forced this Petitioner into court without the benefit of full administrative proceedings.

It is clear from a review of the record that Respondent consolidated Petitioner's allegations 11-18 (except allegation 14) and rejected all other

allegations, including Petitioner's allegation 14. In rejecting Petitioner's complaint, Respondent gave only a very general and brief explanation that was not supported by any facts. (See pp. A-46 and A-47) Respondent rejected Petitioner's complaint in violation of 29 C.F.R.

§ 1613.215 and in so doing, did not provide Petitioner with a thorough review of the circumstances under which the alleged discrimination occurred in violation of 29 C.F.R. § 1613.216.

Respondent has relied on EEO-MD107, Section 2.5(c) (See p. A-60) to justify its rejection of Petitioner's so-called "spin-off" allegations. Assuming that Respondent would be bound by EEO-MD107, Respondent also failed to follow the instructions contained therein. EEO-MD107, Section 2.5(c) provides that "[i]f

after counseling, a complainant files a formal discrimination complaint relating to the manner in which the agency is processing his/her pending complaint, the agency will consolidate the new allegation with the pending complaint for processing and notify complainant of the consolidation." (See p. A-62) At the time of the filing of this complaint, Petitioner had six other complaints pending in two different fora. It was difficult to identify with which of the six complaints that the allegations should have been consolidated. Respondent had recommended consolidation but did not do so with an understanding of the circumstances. Respondent erroneously suggested that Petitioner consolidate her allegations with the allegations in case

No. 88-0004.⁶ This was erroneous because the allegations in OSH-82-89 arose out of different facts and circumstances from those alleged in the complaints that were part of Case No. 88-0004. Respondent did not know this because it did not thoroughly investigate the facts and circumstances. Petitioner heeded Respondent's erroneous advice and amended its complaint in Case No. 88-0004 to include improper processing; however, this issue was never raised at trial nor addressed by the District Court in its

⁶Case No. 88-0004 arose because Respondent had consolidated and rejected certain issues in Petitioner's complaint numbers SSA-102-86 and SSA-366-86. Petitioner brought a civil action to contest this consolidation and rejection of issues. Respondent then cancelled the two aforementioned complaints as well as two of Petitioner's other complaints (SSA-442-85 and SSA-466-87, which alleged, inter alia, improper processing). Petitioner never intended to try her case on the merits at that time but the trial occurred.

decision on the merits. This is understandable since the facts and circumstances were not related. The improper processing alleged in OSH-82-89 was distinct and separate from the improper processing in the amended complaint. This issue will be discussed further in Section II below.

Whether this Court considers 29 C.F.R. Part 1613, or EEO-MD107 as controlling authority,⁷ it is clear that Petitioner did not have her complaint, OSH-82-89, fully and properly processed. In its Motion for Summary Affirmance to the Court of Appeals, Respondent asserted that Petitioner's allegations of improper processing was moot. Petitioner submits

⁷Issue I before this Court does not address whether 29 C.F.R. Part 1613 or EEO-MD107 should be controlling authority because they both support Petitioner's claim.

that it is impossible to properly determine if an issue is moot without full and complete processing of the complaint and thorough investigation by Respondent of the facts underlying Petitioner's complaint.

Whether or not this issue is moot does not diminish the fact that Respondent violated; (a) 29 C.F.R. § 1613.215 by improperly rejecting Petitioner's complaint, (b) 29 C.F.R. § 1613.216 by failing to fully and properly investigate and process Petitioner's complaint, and (c) EEO-MD107 by failing to consolidate the new allegation with the pending complaint and notify Petitioner. The intent of Title VII and the language of 29 C.F.R. Part 1613 are clear. There is no conflict in controlling authority.

The posture of Petitioner's numerous claims against Respondent can be described as fragmented. Of the various complaints made by Petitioner over the years, two complaints dating back to 1984 are still in the system. (See p. A-65) In the case before this Court, virtually no administrative consideration has been given to the pattern of conduct Petitioner raised. Complete administrative processing of complaint OSH-82-89 can aid in understanding the intricate and complex relationships among all the matters raised in the complaint and more completely develop the facts of all the interrelated matters raised. Continuing to proceed in the piecemeal fashion that Respondent has forced upon Petitioner invites incomplete review by separate fora and limits, in each separate proceeding, the relevance of

evidence concerning matters other than those specifically under review in that particular proceeding.⁸ The result of such piecemeal litigation is that no forum is presented with all the facts, and Petitioner is deprived the benefit of a full hearing in any proceeding. In the interests of judicial economy and convenience to the parties, along with the desire to preserve the integrity of the administrative process and intent of Title VII, this Court should exercise its discretion and remand the entire administrative complaint number OSH-82-89

⁸The District Court has already rendered a decision finding no discrimination in Case No. 88-0004, however, all of Petitioner's evidence was not presented or considered during the trial. The facts giving rise to complaint OSH-82-89 are different from the facts that could have been raised in District Court Case No. 88-0004.

to Respondent for investigation and complete administrative proceeding.⁹

II. The improper acts in processing of Petitioner's complaint should be viewed as separate discriminatory acts that could be presented by Petitioner as a basis for a claim of discrimination under Title VII.

The second issue of the case before this Court addresses a federal issue of significant importance. There is a tremendous backlog of cases in various federal agencies, including the EEOC. The current system exacerbates this backlog by forcing Petitioner to file additional separate complaints. To this date, all of

⁹See Clemente v. United States, 36 Fair Empl. Prac. Cas. (BNA) 1713, 1714 (C.D. Cal. 1980) (remanding to agency in the interest of justice and fairness to all parties). See also, Cosgrove v. Bolger, 775 F.2d 1078, 1080 (9th Cir. 1985) (noting that case had been remanded to agency, upon government's motion to dismiss for failure to exhaust administrative remedies, for determination as to whether untimely contact with Counselor should be excused under 29 C.F.R. § 1613.214(a)(4)).

Petitioner's allegations have never been heard in one forum.

Petitioner has been aggrieved by Respondent's failure to fully and properly process her various complaints. Petitioner has never been permitted to prove that the processing of her complaint was discriminatory. The mechanisms currently in place for the inclusion of complaints for improper processing are inadequate. The failure of the EEOC and other administrative agencies to recognize improper processing as a separate and distinct discriminatory act eviscerates the intent of Title VII.

In the case before this Court, Respondent rendered a decision to reject Petitioner's improper processing complaint OSH-82-89. Petitioner was allegedly a victim of discrimination based upon the

allegations of her six other complaints. These complaints have been bounced through the system and fragmented over the past seven and one-half years. The decisions and resulting delays, though not so unusual, warrant some investigation.

Over the years, many of Petitioner's claims have been rejected, cancelled, closed, consolidated, modified, fragmented and even ignored. Petitioner has raised improper processing in several complaints. Petitioner did not have counsel at the administrative level for any of her complaints and did not articulate the facts giving rise to each of her improper processing complaints. Each time that a complaint for improper processing has been filed, there have been specific and distinct facts that have given rise to each complaint. For the complaint at

issue in the case before this Court, the immediate basis for such complaint was Respondent's improper consolidation and rejection of certain issues in complaints SSA-102-86 and SSA-366-86.¹⁰

In her complaints, Petitioner has made it her practice to be overinclusive rather than underinclusive and to attempt to provide a cumulative list of discriminatory acts. As a result, Respondent, the EEOC and the lower courts have interpreted Petitioner's complaints

¹⁰These were two of the four complaints at issue in District Court Case No. 88-0004. Respondent would argue that these complaints were properly cancelled because Petitioner brought a civil action; however, the civil action was initially brought to appeal Respondent's improper consolidation and rejection of certain issues in these two complaints. The civil action was not brought to try the case on the merits. The cancellation of the complaints forced Petitioner to try the case on the merits without consideration of all facts and circumstances.

as addressing the same identical improper processing issues. This is not the case. If Respondent would have investigated further as required by 29 C.F.R.

§ 1613.216, it would have discovered that Petitioner's complaints were based on different facts and circumstances. Petitioner was pro se and attempted to explain this numerous times to Respondent. Due to Respondent's failure to investigate, Petitioner's complaint OSH-82-89 has been barred by res judicata. Petitioner was overinclusive because she feared that she would prejudice her rights by being underinclusive.

If we analogize the facts in this case to a tort action in battery, the analysis becomes more clear. A Title VII suit has its basis in a tort action. If a plaintiff were battered by a defendant and

plaintiff's jaw were broken, that would be one separate and distinct battery. As a result thereof, plaintiff initiates a suit against defendant to recover medical and other expenses. After plaintiff wins his suit, defendant batters plaintiff again and breaks his nose. The second battery is separate and distinct and arose out of different facts and circumstances. A court should not bar an action based upon the second battery because of res judicata. As in the above example, Petitioner's improper processing complaint at issue before this Court arose out of different facts and circumstances from those giving rise to Petitioner's complaints at issue in Case No. 88-0004 or any other complaint. The District Court barred Petitioner's suit without careful consideration of the facts and

circumstances. As a result, the res judicata bar was inappropriate.

Respondent has articulated that "even if Petitioner's allegations of administrative mishandling of her complaints were true, the right to be free of discrimination is wholly preserved, even if the [agency] errs in its processing of the charge, by the right to a trial de novo."¹¹ The District Court adopted this rationale. (See pp. A-16 and A-17) This would be true if Petitioner's complaints had not been fragmented by Respondent over the years. By its actions of fragmenting and rejecting Petitioner's claims over the years, Respondent has deprived Petitioner of the redress

¹¹Respondent's Motion for Summary Affirmance submitted to the Court of Appeals, (Citing, Hall v. EEOC, 456 F. Supp. 695, 700 (N.D. Cal. 1978)).

intended by Congress in enacting Title VII. Petitioner has never been given the opportunity to explain to any agency or court what has been done to all of her complaints. It is clear that any agency under investigation, including Respondent, could intentionally fragment a complainant's complaints knowing that such fragmentation would weaken each of complainant's complaints. This clearly was not intended by Congress. Case No. 88-0004 that was decided on the merits in District Court only purportedly addressed four of Petitioner's seven complaints. This case did not even fully address those four complaints. In that case, the issue of improper processing, though alleged in the amended complaint, was never tried nor was it ever addressed by the court. As articulated above, the improper processing

in that complaint arose out of a different and distinct set of facts from those alleged in OSH-82-89. Petitioner has not had any of her improper processing claims fully and completely processed or litigated. If EEO-MD107 were followed, OSH-82-89 could be consolidated with another complaint. Unfortunately, the judgment in Case No. 88-0004 is final, so there is no case with which OSH-82-89 could be properly consolidated.¹² As a result of the fragmentation of Petitioner's complaints, Petitioner's right to be free of discrimination has not

¹²Petitioner has one of her complaints (ASH-401-84) pending filing of briefs in Maryland District Court (No. Y-85-2547), and another complaint (ASH-262-84) for which a request for hearing has been made with the EEOC and MSPB. Petitioner is represented by other counsel in those matters.

been preserved by the right to a trial de novo.

Petitioner has never been given the opportunity to prove that the manner in which Respondent processed her claim was discriminatory. If an agency were to process a particular complainant's complaint differently from that of another complainant and the first complainant could prove that this disparate treatment occurred due to the first complainant's national origin, race or other impermissible classification, surely this would adversely impact complainant and be viewed as a Title VII violation by that agency. Without the recognition by a court of this type of complaint, which is the type of complaint at issue before this Court, the intent of Title VII would be

frustrated. Congress surely did not intend to allow an agency to improperly process a complaint in a discriminatory manner. Since an agency has the authority to investigate its own alleged discriminatory acts, the investigation by such agency should be fair and complete. To allow Respondent to thwart Petitioner's attempt at full and proper processing of her complaint essentially prevents Petitioner from having her allegations effectively processed through the system as Congress intended. The District Court in its opinion even acknowledged that "a Title VII plaintiff may point to improper processing of claims as evidence of an employer's discriminatory motive." (See footnote 2, p. A-16) Petitioner should be permitted to present evidence that the

manner in which Respondent processed her complaint was discriminatory.

It is not the current policy of Respondent or the EEOC to recognize improper processing complaints as separate and distinct discriminatory acts. This policy runs counter to the intent of Title VII. The EEOC has even acknowledged that an improper processing complaint is technically within the purview of 29 C.F.R. Part 1613.¹³ Analogy to tort law supports the recognition of an improper processing claim as a separate action. If such a separate action is recognized, the District Court erred in its application of res judicata. If a separate action is not recognized, the District Court should

¹³The September 29, 1982, version of EEO-MB107, Section 6, states that "[an improper processing complaint is] technically within the purview of 29 C.F.R. Part 1613..."

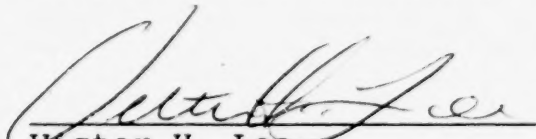
still have remanded the matter to Respondent for full and complete processing.

Neither Congress nor the EEOC intended Petitioner to have to go through the procedures that Petitioner has had to endure in order to have her discrimination claim fully and properly addressed. The most equitable and efficient result would be to remand the complaint at issue in the case before this Court for full and complete processing by Respondent and to recognize a separate discrimination action for improper processing. In addition, Petitioner should be awarded attorney's fees under the Equal Access to Justice Act. See 28 U.S.C. § 2412.

CONCLUSION

For the reasons specified above, a writ of certiorari should be issued for the within matter.

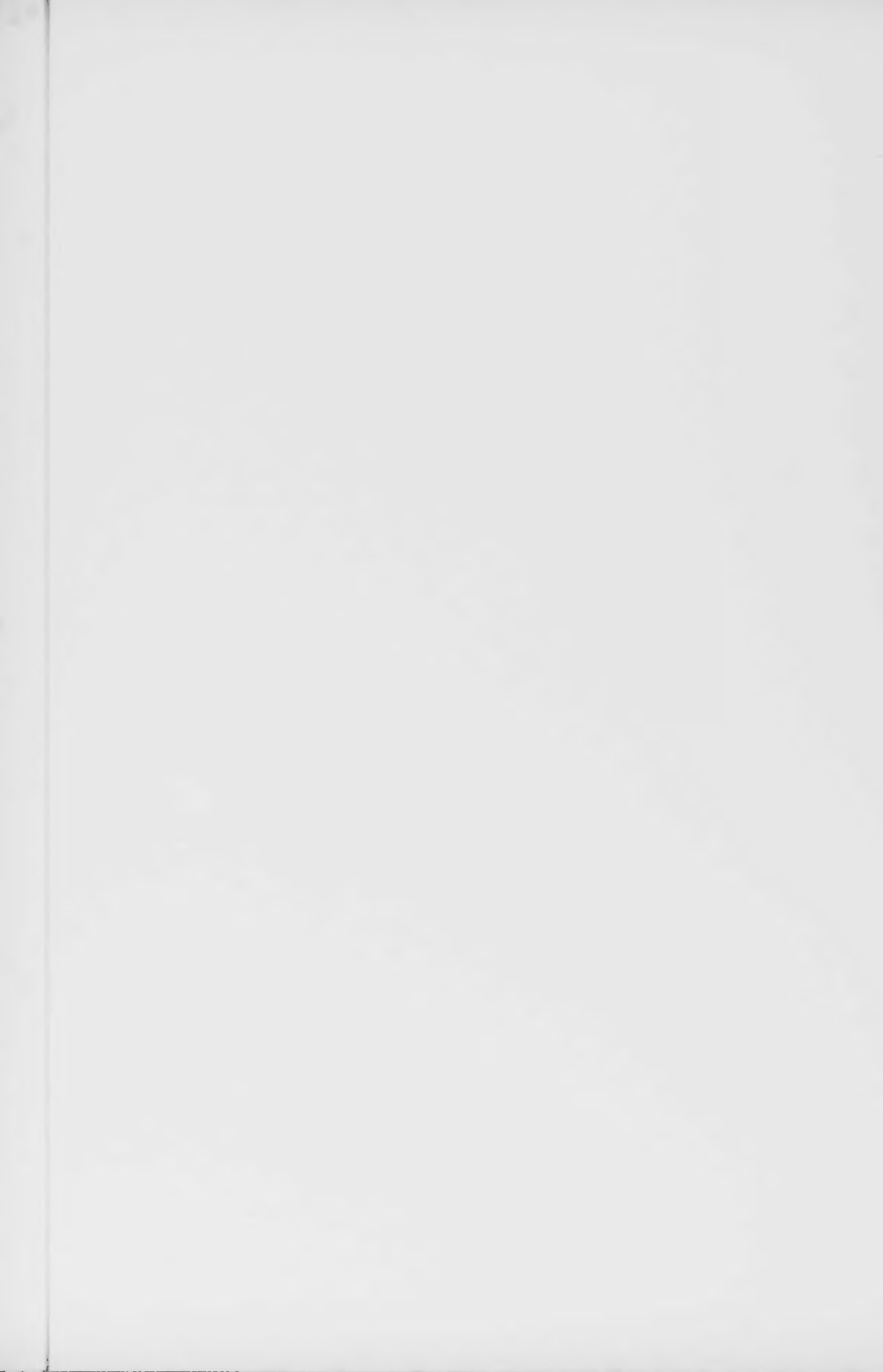
Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Victor H. Lee", is written over a horizontal line.

Bitonti & Wilhelm, P.C.
2010 Corporate Ridge,
Suite 410
McLean, Virginia 22102
(703) 749-4055

Counsel for Petitioner

APPENDIX



UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5195
September Term, 1991

CA No. 89-2227
Filed: September 19, 1991

Lih Y. Young,

Appellant

v.

Louis W. Sullivan
Secretary of Health and Human Services

BEFORE: Edwards, Buckley and Williams,
Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing and of the appendix material submitted in support thereof, all filed August 12, 1991, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: _____ /s/

Robert A. Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5195
September Term, 1991

CA No. 89-02227
Filed: September 19, 1991

Lih Y. Young,

Appellant

v.

Louis W. Sullivan
Secretary of Health and Human Services

BEFORE: Mikva, Chief Judge;
Wald, Edwards, Ruth B.
Ginsburg, Silberman,
Buckley, Williams,
D.H. Ginsburg,
Sentelle, Thomas,
Henderson and
Randolph, Circuit
Judges

O R D E R

Appellant's Suggestion for Rehearing
En Banc and appendix material in support

thereof have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

By: _____/s/_____

Robert A. Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5195
September Term, 1990

CA No. 89-02227
Filed: June 28, 1991

Lih Y. Young
Appellant
v.

Louis W. Sullivan, M.D., Secretary, HHS,
et al.

BEFORE: Edwards, Buckley and Williams,
Circuit Judges

O R D E R

Upon consideration of appellees' motion for summary affirmance, and the response thereto; appellant's motion for summary judgment, construed as a motion for summary reversal, the response thereto and the reply; and appellant's motion to retain and preserve records and motion to

request for tapes, it is

ORDERED that appellant's motion for summary judgment, construed as a motion for summary reversal, be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted substantially for the reasons stated by the district court in its Amended Memorandum of Opinion and Order filed March 19, 1990, and Memorandum of Opinion and Order filed June 6, 1990. The merits of the parties' positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the remaining motion be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. LIH Y. YOUNG
Plaintiff

v.

HON. LOUIS SULLIVAN,
Secretary, Department of Health and Human
Services.
Defendant

Civil Action No. 89-2227
Judge George H. Revercomb
Filed: June 6, 1990

MEMORANDUM OF OPINION AND ORDER

This is a Title VII action in which plaintiff, pro se, Dr. Lih Y. Young, alleges that her former employer, the Department of Health and Human Services ("the Department"), discriminated against her on the basis of race and national origin and engaged in retaliatory conduct for plaintiff's filing of an EEO complaint. Plaintiff's other claims, that

the Department and the Equal Employment Opportunity Commission improperly processed and investigated her administrative claims for relief, were dismissed by order dated February 21, 1990. At bar is the Secretary of Health and Human Services's Second Motion to Dismiss.

Defendant's motion to dismiss is GRANTED as the instant case is barred by the doctrine of res judicata. In her 1988 lawsuit against the Secretary of the Department of Health and Human Services,¹

¹ Plaintiff brought two other lawsuits alleging the Department's discrimination and reprisal. Young v. National Center for Health Services Research, C.A. Y85-2547 in the United States District Court for the District of Maryland; Dr. Lih Y. Young v. Hon. Otis R. Bowen, etc., C.A. 88-768, in the United States District Court for the District of Maryland. Given the past litigation in this Court, the Court need not decide whether the Maryland actions bar plaintiff's case here.

plaintiff claimed that she was illegally discriminated against and terminated by the Department in violation of Title VII. Lih Y. Young v. Secretary of Department of Health & Human Service, Civil Action No. 88-0004 (GHR). Plaintiff asserted that throughout the 1978-1986 time period, she had "been terminated, denied promotions and awards, denied training and equipment, reprimanded against and otherwise been the victim of a pattern and practice of discrimination in violation of Title VII concerning her working conditions and the processing of her complaints," that she was "terminated due to her race, national origin and in reprisal for her prior protected activities in June 1986," that "the agency engaged in a pattern and practice of discrimination against plaintiff and other minorities from 1978

to 1986," and that "after she filed her first administrative EEO complaint, [she] was a victim of reprisal by the agency." Amended Complaint, Civil Action No. 88-0004, pars. 7-9. After a two day trial on the merits, this Court found "that plaintiff failed to prove discrimination or reprisal under Title VII" and entered judgment for the Department on July 26, 1989.

Plaintiff asserts the same causes of action and makes the same factual allegations in the instant case. She again claims of discrimination and reprisal regarding her termination, her disciplinary actions, her promotion opportunities, the denial of awards, training and equipment and the processing of her administrative complaints during the 1978-1986 time period. Her opposition

papers make no attempt to articulate the facts or legal theories which plaintiff vaguely asserts are "distinct" from those in the 1988 action. Given the record, this Court can only conclude that res judicata bars the instant lawsuit.

Accordingly, this action is DISMISSED in its entirety.

6/6/90
Date

/s/
United States
District Court
Judge George H. Revercomb

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. LIH Y. YOUNG

Plaintiff

v.

HON. LOUIS SULLIVAN,
Secretary, Department of
Health and Human Services,

HON. CLARENCE THOMAS
Chairman, Equal Employment
Opportunity Commission,

Defendants.

Civil Action No. 89-2227
Judge George H. Revercomb
Filed: March 19, 1990

AMENDED MEMORANDUM OF OPINION AND ORDER

It has come to the Court's attention that its Order of February 21, 1990 contained a clerical error on pages 2-3. The Court now AMENDS its February 21, 1990 Order. see Fed. Rules Civ. Proc., Rule 60(a).

This is a Title VII action in which

plaintiff, pro se, Dr. Lih Y. Young, alleges that her former employer, the Department of Health and Human Services, discriminated against her on the basis of race and national origin and engaged retaliatory conduct for plaintiff's earlier filing of an EEO complaint. Plaintiff further alleges that both the Department and the Equal Employment Opportunity Commission improperly processed and investigated her administrative claims for relief. Plaintiff requests this Court to order the agencies to fully investigate her administrative complaint or, in the alternative, for de novo review of her discrimination/retaliation allegations. At bar are defendants Louis Sullivan ("Sullivan") and Clarence Thomas's ("Thomas") motions to dismiss the

complaint as failing to state a cause of action as a matter of law.

Defendant Thomas's motion to dismiss is GRANTED in its entirety. Title VII provides a former employee with a remedy only against his or her employer.¹ see 42 U.S.C. §§ 2000e-2, 2000e-5(f)(1). It does not create an independent cause of action against the EEOC for its investigation and processing of a charge. McCottrell v. E.E.O.C., 726 F.2d 350, 351 (7th Cir. 1984); Ward v. E.E.O.C., 719 F.2d 311, 313 (9th Cir. 1983), Cert. denied, 466 U.S. 953 (1984); Gibson v. Missouri Pac. R. Co., 579 F.2d 890, 891 (5th Cir. 1978). cert. denied, 440 U.S. 921 (1979); Svenson v. Thomas, 607 F. Supp. 1004 (D.D.C. 1985) (Harris, J.); see also Francis-Sobel v.

¹ Plaintiff does not allege that she was employed by the EEOC.

University of Maine, 597 F.2d 15 (1st Cir. 1979), cert. denied, 444 U.S. 949 (1979); Georator Corp. v. Equal Emp. Opp. Com'n, 592 F.2d 765 (4th Cir. 1979).

Accordingly, plaintiff's action is DISMISSED as to defendant Thomas.

Defendant Sullivan's motion to dismiss is GRANTED in part and DENIED in part. Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints.²

Title VII must be viewed as a comprehensive statutory scheme designed to eradicate employment discrimination. The only "right" it establishes is the right to be free of discrimination. This interest is wholly preserved, even if the EEOC errs in its processing of the charge,

² In some cases, however, a Title VII plaintiff may point to improper processing of claims as evidence of an employer's discriminatory motive.

by the right to a trial de novo... Hall v. Equal Employment Opportunity Com'n, 456 F. Supp. 695, 700 (N.D. Cal. 1978).

Accordingly, Counts I, V, VI and VIII are DISMISSED. Counts II, III, IV and VII which allege claims of discrimination and retaliation remain.

It also appears from defendant Sullivan's motion to dismiss that there may be other legal issues which dispose of or narrow the issues in this case, (i.e. whether plaintiff's claims are barred by res judicata, whether plaintiff's lawsuit was timely filed). Accordingly, IT IS FURTHER ORDERED THAT

The parties file further dispositive motions on or before March 16, 1990.

3/19/90
Date

_____/s/_____
United States
District Court
Judge George H. Revercomb

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DR. LIH Y. YOUNG

Plaintiff

v.

HON. LOUIS SULLIVAN
Secretary, Department of
Health and Human Services

HON. CLARENCE THOMAS
Chairman, Equal Employment
Opportunity Commission

Defendants

Civil Action No. 89-2227
Judge George H. Revercomb
Filed: February 21, 1990

MEMORANDUM OF OPINION AND ORDER

This is a Title VII action in which plaintiff, pro se, Dr. Lih Y. Young, alleges that her former employer, the Department of Health and Human Services, discriminated against her on the basis of race and national origin and engaged retaliatory conduct for plaintiff's

earlier filing of an EEO complaint. Plaintiff further alleges that both the Department and the Equal Employment Opportunity Commission improperly processed and investigated her administrative claims for relief. Plaintiff requests this Court to order the agencies to fully investigate her administrative complaint or, in the alternative, for de novo review of her discrimination/retaliation allegations. At bar are defendants Louis Sullivan ("Sullivan") and Clarence Thomas's ("Thomas") motions to dismiss the complaint as failing to state a ("Thomas") motions to dismiss the complaint as failing to state a cause of action as a matter of law.

Defendant Thomas's motion to dismiss is GRANTED in its entirety. Title VII

provides a former employee with a remedy only against his or her employer.¹ see 42 U.S.C. §§ 2000e-2, 2000e-5(f)(1). It does not create an independent cause of action against the EEOC for its investigation and processing of a charge. McCottrell v. E.E.O.C., 726 F.2d 350, 351 (7th Cir. 1984); Ward v. E.E.O.C., 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984); Gibson v. Missouri Pac. R. Co., 579 F.2d 890, 891 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979); Svenson v. Thomas, 607 F. Supp. 1004 (D.D.C. 1985) (Harris, J.); see also Francis-Sobel v. University of Maine, 597 F.2d 15 (1st Cir. 1979), cert. denied, 444 U.S. 949 (1979); Georator Corp. v. Equal Emp. Opp. Com'n, 592 F.2d 765 (4th Cir. 1979).

¹ Plaintiff does not allege that she was employed by the EEOC.

Accordingly, plaintiff's action is DISMISSED as to defendant Thomas.

Defendant Sullivan's motion to dismiss is GRANTED in part and DENIED in part. Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints.²

Title VII must be viewed as a comprehensive statutory scheme designed to eradicate employment discrimination. The only "right" it establishes is the right to be free of discrimination. This interest is wholly preserved, even if the [sic]

Accordingly, Counts I, V, VI and VIII are DISMISSED. Counts II, III, IV and VII which allege claims of discrimination and retaliation remain.

² In some cases, however, a Title VII plaintiff may point to improper processing of claims as evidence of an employer's discriminatory motive.

It also appears from defendant Sullivan's motion to dismiss that there may be other legal issues which dispose of or narrow the issues in this case, (i.e. whether plaintiff's claims are barred by res judicata, whether plaintiff's lawsuit was timely filed). Accordingly, IT IS FURTHER ORDERED THAT

The parties file further dispositive motions on or before March 16, 1990.

2/21/90
Date

/s/
United States
District Court
Judge George H. Revercomb

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

Office of Review and Appeals
P.O. Box 19848
Washington, D.C. 20036

Appeal No. 01892062
Agency No. OSH-82-89
Dated: June 28, 1989

Lih Y. Young,
Appellant,

v.

Dr. Louis W. Sullivan, MD,
Secretary,
Department of Health & Human Services,
Agency.

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning his complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. The final agency decision was received by appellant on March 8, 1989. The appeal was postmarked March 27, 1989.

Accordingly, the appeal is timely (see 29 C.F.R. §1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as amended.

The issue on appeal is whether the agency properly rejected portions of appellant's complaint on the grounds that the rejected allegations failed to state a claim under 29 C.F.R. §1613.212 and the remaining portions on the grounds that the allegations are spin-offs of previous complaints, which are part of a pending civil action.

A review of the record reveals that appellant alleged discrimination on the basis of national origin, race and reprisal when:

- (1) from 1978 to the present other employees "without the required skills and knowledge were promoted to senior staff positions";
- (2) from 1978 to the present minorities were assigned to do "impossible jobs or work under very difficult and constrained conditions";
- (3) from 1978 to the present "too little weight was placed on formal education and quality of technical

skills" while
"falsification of
performance and
misconduct are not
disciplined";

(4) from 1978 to the
present, the agency
has "define[d] good
workers absolutely the
wrong way";

(5) from 1978 to the
present minorities
have been placed at
"much lower GS-levels
than other employees";

(6) from 1978 to the
present minorities
have not been promoted
by the agency at the
same pace as other

employees;

- (7) from 1978 to the present minorities with advanced education and technical skills have been "unjustly degraded, disciplined, terminated or placed under constructive discharge in order to vacate positions for other employees or intimidate them from applying for higher positions";
- (8) from 1978 to the present the agency has been involved in conspiracy and

misconduct "including obstruction of minorities' work, falsification of documents and violations of government rules and regulations";

(9) from 1984 to the present the agency provided false statements and misleading documents to the EEO Investigator;

(10) from 1978 to the present the agency refused to provide appellant with information for

investigations and a
hearing; and

(11) from 1984 to the
present the agency
"would not cooperate
faithfully with EEO
counselors, EEO
investigators and
hearing examiners;
misled [appellant] at
various states of
[his] complaints;
delayed processing
complaints and
rejected issues and
dispositions; limited
the request for
reopening complaints;
postponed and canceled
hearings; disregarded

rulings in complaints;
and rejected
complaints." [Sic].

The agency requested more specific information from appellant on several occasions so as to better define his allegations. Appellant failed to provide the specific information requested.

In its final decision, the agency rejected allegations one through eight for failure to state a claim and rejected allegations nine through eleven because it stated they are spin-offs of previous complaints which are part of a pending civil action.

In the instant case, we find that appellant is not aggrieved since he has failed to allege any personal loss or harm as the result of the eleven alleged

discriminatory actions. Appellant alleges discrimination against "minorities" in general and has not indicated how he, personally, is aggrieved. Section 1613.212(a) provides only for the acceptance of complaints from persons who are themselves aggrieved by the conduct of which they complain. Appellant may not pursue his complaint in the hope of obtaining relief on behalf of other employees.

In its final decision, the agency rejected allegations nine through eleven as spin-offs of prior complaints which are part of a pending civil action. The Commission notes that the case record contains no evidence of appellant's prior complaints or of the issues in these complaints. Additionally, there is no evidence of the . .

pending civil action in the case record. However, the Commission finds that all of appellants allegations (one through eleven) fail to state a claim for the above mentioned reasons.

Accordingly, the agency's decision to reject appellant's complaint was proper and is AFFIRMED, although, in part, on different grounds. 29 C.F.R. §1613.215(a)(1).

STATEMENT OF RIGHTS - ON APPEAL

RIGHT TO REQUEST REOPENING

This decision is final unless a timely request to reopen is filed.

The Commissioners may, in their discretion, reopen and reconsider the decision in this case if you or the agency

submits a written request and argument which tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or
2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or
3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

Requests and supporting arguments MUST be submitted to the Commission and the opposing party within the 30-day time frame for filing a request to reopen. A cross request to reopen, or any argument in opposition to the request to reopen, MUST be submitted to the Commission and the opposing party within 20 days or receipt of the request to reopen. See, 29 C.F.R. 1613.235. All request and arguments must bear proof of postmark and be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, P.O. Box 19848, Washington, D.C. 20036. In the absence of a postmark, the request to reopen shall be deemed filed on the date it is received by the Commission.

RIGHT TO FILE A CIVIL ACTION

You have the right to file a civil action

in an appropriate United States District Court WITHIN THIRTY (30) DAYS of the date that you receive this decision, unless within that time you decide to file a request to reopen. As to any claim based on the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a), you MAY have up to six years after the right of action first accrued. See Lehmen v. Nakshian, 453 U.S. 156 (1981); 29 U.S.C. 633a(f); and 28 U.S.C. 2401(a). If you file a civil action, YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT. Agency or department means the national organization, and not the local office, facility or department in which you might work. DO NOT NAME JUST THE AGENCY OR DEPARTMENT. You must also state the official title of the agency head or

department head. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or department head may result in the dismissal of your case.

RIGHT TO COUNSEL

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request that the Court appoint an attorney to represent you, and that the Court permits you to file the civil action without payment of fees, costs or security. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq., as amended; the Rehabilitation Act of 1973, 29 U.S.C. Sections 791, 794(c), as amended. Filing a request for an attorney does not extend your time in which to file a civil action. Both the request and the civil action MUST BE FILED WITHIN THIRTY

(30) DAYS from the date you receive the
Commission's decision.

June 28, 1989

Date

/s/

Dolores L. Rozzi,
Director Office of
Review and Appeals

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Office of the Secretary
Washington, D.C.

CERTIFIED MAIL RETURN RECEIPT REQUESTED

Dr. Lih Y. Young
1121 Pipestem Place
Rockville, Maryland 20854

February 10, 1989
File No. OSH 82-89

Dear Dr. Young:

This is to inform you of the Department's decision to reject your formal complaint of discrimination based on national origin (Asian), race (Chinese) and a complaint of reprisal for having previously filed an EEO complaint, filed November 21, 1988, against the Office of the Secretary (OS).

Issue/Allegation No. 1

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present many employees without

required knowledge and skills, advanced education, technical or managerial skills are promoted from GS-4/5 or 7 to senior staff positions at the expense of minorities who are much better qualified for those positions. [sic]

Issue/Allegation No. 2

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present minorities are assigned to do impossible jobs or work under very difficult and constrained conditions. [sic]

Issue/Allegation No. 3

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to the present too little weights on formal education and quality of technical

skills are used in evaluating employees' qualification, while falsification of performance and misconducts are not disciplined. [sic]

Issue/Allegation No. 4

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present the Department defines good workers absolutely the wrong way. [sic]

Issue/Allegation No. 5

You alleged that, because of your national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present minorities are placed at much lower GS-levels than other employees, given education, qualification and task assignment. [sic]

Issue/Allegation No. 6

You alleged that, because of your national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present the Department does not promote the minorities at the same pace as it promotes other employees. [sic]

Issue/Allegation No. 7

You alleged that, because of your national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present minorities with advanced education and better technical skills are unjustly degraded, disciplined, terminated or placed under constructive discharge in order to vacate positions for other employees or intimidate them from applying for higher positions. [sic]

Issue/Allegation No. 8

You alleged that, because of your national

origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present the Department is involved in and conspired with misconducts, including obstruction of minorities' work, falsification, misleading documents and violations of government rules and regulations in practicing discrimination. [sic]

The Equal Employment Opportunity Commission's (EEOC) Federal sector regulations which govern the processing of discrimination complaints are set forth at Title 29, Code of Federal Regulations, Part 1613 (29 CFR 1613). Section 1613.215(a)(1) of the regulations provides, in pertinent part, that the agency shall reject a complaint that fails to state a claim under Section 1613.212.

Section 1613.212(a) requires the agency to "...provide ...for the acceptance of, a complaint from any aggrieved employee...who believes that ...[s]he has been discriminated against ..."

(underscoring added).

We have carefully reviewed your formal complaint and its attachments. Even though these documents reflect your broad concerns about the operations of OS and the alleged discriminatory treatment of other employees and minorities, we are unable to identify any specific employment matter or personnel action in Issues/Allegations Numbers 1 through 8 which concerns you personally. Moreover, the allegations which you presented appear to be in the nature of a third party complaint on behalf of unidentified

employees and minorities. Your complaint is subject to rejection, under 29 CFR 1613.215(a)(1), because you have not alleged an act of discrimination under Section 1613.212.

Issue/Allegation No. 9

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1984 to present the Department unjustly provided false statements and misleading documents to the EEO investigator. [sic]

Issue/Allegation No. 10

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, from 1978 to present the Department would not provide you with employee and public information for investigations and a hearing. [sic]

Issue/Allegation No. 11

You alleged that because of national origin, race and in reprisal for having previously filed an EEO complaint, the Department discriminated against you in the following manner from 1984 to present: would not cooperate faithfully with EEO counselors, EEO investigators and hearing examiners; misled you at various stages of your complaints; delayed processing complaints and rejected issues and dispositions; limited the request for reopening complaints; postponed and canceled hearings; disregarded or unjust ruling in complaints; and, rejected complaints. [sic]

Under the provisions of 29 CFR Section 1613.215(a) (1), the Department shall reject a complaint that states the same

allegations that are pending before or have been decided previously by the agency. Since Issues/Allegations Numbers 9 through 11 are "spin-offs" of those complaints previously filed by you and which you have included in your civil action in a U.S. District Court, they are subject to rejection.

DECISION

For the reasons stated above, it is the decision of the Department of Health and Human Services to reject Issues/Allegations Numbers 1 through 8 in your complaint of discrimination based on national origin, and race and your complaint of reprisal, under the provisions of 29 CFR 1613.215, because you failed to state a claim under 29 CFR 1613.212 and to reject Issues/Allegations Numbers 9 through 11 because they are

"spin-offs" of complaints previously filed by you.

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission (EEOC), 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041; and, in accordance with 29 Code of Federal Regulations Section 1613.233, which states, in pertinent part, the following:

- (a) Except as provided in paragraph
- (b) of this section, you may file a notice of appeal at anytime up to 20 calendar days after receipt of the agency's notice of final decision on your complaint. Any statement or

brief in support of the appeal must be submitted to the Commission and to the defendant agency within thirty (30) calendar days of filing the notice of appeal.

- (b) The 20-day time limit within which a notice of appeal must be filed will not be extended by the Commission unless, based on a written showing by you that you were not notified of the prescribed time limit and was not otherwise aware of it or that circumstances beyond your control prevented the filing of a notice of appeal within the prescribed time limit, the Commission exercises its discretion to extend the time

limit and accept the appeal.

Instead of filing an appeal with the Commission, you may elect to file a civil action in the appropriate U.S. District Court within 30 calendar days after receipt of this decision. The right to file a civil action is not forfeited by appealing to the Commission, however. It may be exercised within 30 calendar days after receipt of the Commission's appeal decision or, if a decision has not been issued, 180 calendar days after the Commission accepted the appeal. You may not both appeal to the Commission and file a civil action. Whenever you file a civil action, the Department must terminate all administrative processing by canceling the complaint.

If you have alleged only prohibited age discrimination, you must exhaust all administrative remedies before you can file a civil action. Thus, if this decision is based on alleged prohibited age discrimination alone and you appeal, the Commission will provide any advice in its appeal decision concerning further rights of review, appeal, and reopening, and of the right to file a civil action under the Age Discrimination in Employment Act (ADEA). Please note, however, that if a civil action is to be filed, it must be filed within six years of the occurrence of the alleged prohibited age discriminatory act or action, incident, or event.

If you elect to file a civil action, you are advised that you may appeal to a U.S.

District Court for appointment of an attorney to represent you in any court proceeding relating to this decision. The Court may appoint an attorney to represent you and may permit commencement of a civil action without payment of fees, costs, or security.

FOR THE DEPARTMENT:

 /s/
Thomas S. McFee
Director,
Equal Employment Opportunity

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Secretary
Washington, D.C.

CERTIFIED-RETURN RECEIPT REQUESTED

Lih Y. Young, Ph.D. October 5, 1988
1121 Pipestem Place -
Rockville, Maryland 20854

Dear Dr. Young:

The enclosed HHS-651, "Initial Interview and Informal EEO Counseling Report," was prepared in accordance to your September 29, 1988 response to Ms. Barbara Aulenbach's September 9, 1988 letter.

My next step in the precomplaint counseling process is to meet with the responsible management officials whom you feel were involved in the issues you listed in your letter. However, you did not provide any names of individuals or the names of the offices involved.

Also, I have enclosed a copy of the issues you provided of which I have assigned numbers (1 through 18). For each issue, could you please provide a name of an individual and/or office.

Your assistance in providing the above information will enable me to prepare the final counseling report. My address is: Office of the Secretary, EEO Office, Department of Health and Human Services, Room 4317, Cohen Building, 330 Independence Avenue, S.W., Washington, D.C. 20201. My telephone number is 472-9564.

Sincerely,

/s/

Ann Garrett
EEO Counselor

Enclosures(2)
Initial Counseling Report [omitted]
Listing of 18 issues

COMPLAINED ISSUES

L. Young

DISCRIMINATORY PRACTICES AND POLICIES IN THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (DHHS) AND EEOC

1. It has just been discovered that many employees without required knowledge and skills, advanced education, technical or managerial skills are promoted from GS-4, 5 or 7 to senior staff positions at the expense of minorities who are much better qualified for those positions. 1978-Present

2. Minorities are assigned to do impossible jobs or work under very difficult and constrained conditions. 1978-Present

3. Too little weights on formal education and quality of technical skills are used in evaluating employees qualification, while falsification of performance and

misconducts are not disciplined. These are unfair tactics of discrimination.

1978-Present

4. DHHS defines good workers absolutely the wrong way. 1978-Present

5. Minorities are placed at much lower GS-levels than other employees, given education, qualification and task assignment. 1978-Present

6. DHHS does not promote the minorities at the same pace as it promotes other employees. 1978-Present

7. Minorities with advanced education and better technical skills are unjustly degraded, disciplined, terminated or placed under constructive discharge in order to vacate positions for other employees or intimidate them from applying for higher positions. 1978-Present

8. DHHS offices involve in and conspire

with misconducts, including obstruction of minorities' work, falsification, misleading documents and violations of government rules and regulations in practicing discrimination. 1978-Present

9. DHHS including its SSA offices unjustly provides false statements and misleading documents to the complaint investigator in practicing discrimination. 1984-Present

10. DHHS and SSA would not provide complainant with employee information (e.g., education and performance evaluation with names) and public information (e.g., personnel management manual), for investigation and for hearing. Instead, they supply false or misleading information in the investigative file. 1984-Present

11. DHHS offices would not cooperate

faithfully with EEO counselors, complaint investigators and hearing examiners in practicing discrimination. 1984-Present

12. Complainants are misled at various stages of complaint which are unfair tactics used in practicing discrimination.

1984-Present

13. Undue delays in processing complaints, unjust rejections of complained issues and dispositions are discriminatory. 1986-Present

14. Arbitrary closing of complaints by unwarranted reasons and without investigation is discriminatory. 1984-

Present

15. Limiting the requests for reopening of complaint cases unwarrantedly closed by the DHHS or EEOC is discriminatory. 1984-

Present

16. Unjust postponement and cancellation

of hearings of complaints by the DHHS and EEOC are discriminatory. 1984-Present

17. Disregarding or unjust ruling on complaints which retain no legal representatives is discriminatory. 1984-Present

18. Rejection of complaints due to technicalities of complaint procedures unclear or unknown to laymen and complainants are discriminatory. 1984-Present

Including arbitrary manipulation of EEO counselling and rejection of formal complaint without assigning a case number. 1984-Present

REMEDIES:

- Grant all relieves request in all complaints filed previously by the complainant.

- Declare all complained issues as discriminatory.
- Enjoin all federal offices from further acts of discrimination.
- Investigate the misconducts and wrongdoings seriously, and take actions against those employees.
- Take actions to improve the processing of discrimination complaints.
- Special award and compensation of \$1 million to the complainant.
- Promote minorities to senior positions for each GS-level according to their number of Ph.D. or equivalents as a percentage of those with similar qualification in the metropolitan area.

Section 2

Allegations Regarding the Processing of
Previously-Filed Pending Complaints of
Discrimination

2.2 Background. Complainants sometimes allege, either informally by contacting an EEO Counselor or by other means, or by filing a formal discrimination complaint after counseling, that pending EEO complaints which they have previously filed are being processed improperly or unfairly by an agency because of the complainant's race, color, religion, sex, national origin, physical or mental handicap, age and/or in retaliation for having filed the earlier complaint(s). Those complaints, commonly referred to as

"spin-off" complaints, are not normally identical to the pending complaint but generally allege improper or unfair processing of complaints relating to agency delay in processing the complaint(s), or agency bias during investigation.

The Commission recognizes that federal agencies' internal complaint processing resources, as well as those of the Commission's Office of Review and Appeals, are already taxed with existing caseloads. Therefore, in order to bolster the self-correcting features of the complaint process, complaints concerning undue delay or improper processing of pending complaints must be addressed, but only in connection with the processing of the complaints from which they derive.

Procedural guidance for processing such "spin-off" complaints is contained in paragraph 2.5 of this section...

2.5 Procedures...

(c) Formal Complaint - If after counseling, a complainant files a formal discrimination complaint relating to the manner in which the agency is processing his/her pending complaint, the agency will consolidate the new allegation with the pending complaint for processing and notify the complainant of the consolidation. If the allegation meets the definition of a "spin-off" complaint as set forth in paragraph 2.2 of this section, the agency must process the allegation in accordance with these procedures. Upon issuance of the final agency decision on the

underlying pending complaint(s), the agency will make a decision on the merits of the allegation in accordance with 29 C.F.R. §1613.221.

The agency must conduct an investigation into the allegation(s) of discrimination raised in the "spin-off" complaint, the nature and extent of which will vary depending on the nature and complexity of allegation. However, it is expected that the investigation will result in the development of a sufficient factual record on which to base a finding on the discrimination allegation raised in the "spin-off" complaint.

If a "spin-off" complaint is filed

after the agency completes its investigation into the pending complaint, but before it has forwarded it to the Commission with a request for a hearing, the agency shall conduct such further investigation as is necessary to address the allegation as stated above.

Summary of Petitioner's Complaints

Complaint Number/
Date of
Filing of
Formal Complaint

Status

- | | |
|------------------------------|---|
| 1. ASH-262-84
3/20/84 | Request for hearing
before EEOC and MSPB
is pending. |
| 2. ASH-401-84
5/30/84 | Pending filing of
briefs in Maryland
District Court
(No. Y-85-2547). |
| 3. SSA-442-85
7/22/85 | Consolidated in Case
88-0004.
Final decision
finding no
discrimination. |
| 4. SSA-102-86
1/24/86 | |
| 5. SSA-366-86
7/1/86 | |
| 6. SSA-466-87
9/4/87 | |
| 7. OSH-82-89
6/30/88 | Before this court. |
| 8. (No number)
(awaiting) | New complaint in
process. Pending EEO
counseling. |

2
No. 91-914

RECEIVED
FILED
FEB 14 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1991

LIH Y. YOUNG, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
FRED P. PHILLIPS IV

Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether the U.S. Department of Health and Human Services properly processed petitioner's complaint charging the Department with employment discrimination.

2. Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, creates a private cause of action for the improper processing of employment discrimination complaints.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

<i>Francis-Sobel v. University of Maine</i> , 597 F.2d 15 (1st Cir.), cert. denied, 444 U.S. 949 (1979)	8
<i>Georator Corp. v. EEOC</i> , 592 F.2d 765 (4th Cir. 1979)	8
<i>Gibson v. Missouri Pac. R.R.</i> , 579 F.2d 890 (5th Cir. 1978), cert. denied, 440 U.S. 921 (1979)	8
<i>Hall v. EEOC</i> , 456 F. Supp. 695 (N.D. Cal. 1978) ..	7
<i>Mackey v. Sullivan</i> , 55 Fair Empl. Prac. Cas. (BNA) 1134 (D.D.C. 1991)	7
<i>McCottrell v. EEOC</i> , 726 F.2d 350 (7th Cir. 1984) ..	8
<i>Ward v. EEOC</i> , 719 F.2d 311 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984)	8

Statute and regulations:

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	4, 5, 7, 8
29 C.F.R.:	
§ 1613.212 (a)	2-3, 4
§ 1613.212 (a) (1)	3
§ 1613.215	3
§ 1613.215 (a) (3)	3

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-914

LIH Y. YOUNG, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A5-A7) is unreported, but the decision is noted at 946 F.2d 1568 (Table). The amended order of the district court dismissing the complaint in part (Pet. App. A13-A17) is reported at 733 F. Supp. 131. The subsequent order of the district court dismissing the action (Pet. App. A8-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1991. A petition for rehearing was denied on September 19, 1991. Pet. App. A1-A2. The petition for a writ of certiorari was filed on Decem-

ber 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a female of Chinese national origin, worked in various capacities for the United States Department of Health and Human Services (HHS) from 1978 to 1986. In 1984, she filed the first of at least eight administrative complaints alleging employment discrimination based on race and national origin. Pet. App. A65.

The administrative complaint that gave rise to the present action was filed with HHS in November 1988 and was assigned case number OSH-82-89. Pet. App. A38. In that complaint, petitioner made 18 allegations; they were reviewed by an Equal Employment Opportunity counselor and numbered sequentially. *Id.* at A52-A59. Allegations 1 through 8 charged that from "1978-Present" HHS discriminated against "minorities" in promotions, discharges, job assignments, training, and discipline. *Id.* at A54-A56. Allegations 9 through 18 alleged that from "1984-Present" HHS and the Equal Employment Opportunity Commission (EEOC) improperly processed discrimination complaints. *Id.* at A56-A58. In particular, petitioner alleged that HHS had failed to provide her with information bearing on her discrimination charges and had placed falsified records in her investigative file. *Id.* at A56. More generally, she alleged that discrimination complaints against HHS were subject to undue delays in processing, inadequate investigation, and unjust disposition. *Id.* at A56-A58.

2. HHS rejected petitioner's complaint. Pet. App. A38-A51. It determined that allegations 1 through 8 failed to state a claim of discrimination under 29

C.F.R. 1613.212(a). HHS observed that Section 1613.212(a) provides for the "acceptance of a complaint from any aggrieved *employee* * * * who believes that . . . [s]he has been discriminated against." Pet. App. A43 (quoting, with emphasis, 29 C.F.R. 1613.312(a)). HHS found that petitioner failed to establish in allegations 1 through 8 that she had been aggrieved by the discriminatory conduct that she alleged:

We have carefully reviewed your formal complaint and its attachments. Even though these documents reflect your broad concerns about the operations of [the Office of the Secretary of HHS] and the alleged discriminatory treatment of other employees and minorities, we are unable to identify any specific employment matter or personnel action in Issues/Allegations Numbers 1 through 8 which concerns you personally.

Pet. App. A43. Based on that finding, HHS concluded that rejection of petitioner's complaint as to allegations 1 through 8 was required under 29 C.F.R. 1613.212(a)(1).¹ HHS further concluded that petitioner's remaining allegations were also subject to rejection under 29 C.F.R. 1613.312(a)(1) because they were "'spin-offs' of those complaints previously

¹ 29 C.F.R. 1613.215 provides in relevant part:

(a) The agency head or designee shall reject or cancel a complaint:

(1) That fails to state a claim under § 1613.212 or that states the same claim that is pending before or has been decided previously by the agency.

See also 29 U.S.C. 1613.215(a)(3) (requiring rejection of any complaint "[t]hat is the basis of a pending civil action in a United States District Court in which the complainant is a party").

filed by [petitioner] and which [petitioner] ha[d] included in [her] civil action in a U.S. District Court." Pet. App. A46.

3. On appeal, the EEOC affirmed, concluding that "[HHS's] decision to reject [petitioner's] complaint was proper." Pet. App. A32. The EEOC determined that none of petitioner's allegations stated a claim of discrimination under 29 C.F.R. 1613.212(a) :

[Petitioner] alleges discrimination against 'minorities' in general and has not indicated how [s]he, personally, is aggrieved. Section 1613.212(a) provides only for the acceptance of complaints from persons who are themselves aggrieved by the conduct of which they complain.

Pet. App. A31. In connection with this determination, the EEOC noted that HHS had "requested more specific information from [petitioner] on several occasions so as to better define [her] allegations [but] [petitioner had] failed to provide the specific information." *Id.* at A30.

4. Petitioner then commenced the present action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in the United States District Court for the District of Columbia. She charged HHS with employment discrimination based on race and national origin, and she claimed that she had been retaliated against for filing discrimination complaints. In addition, she alleged that HHS and the EEOC had improperly processed and investigated her administrative complaints. In orders dated March 19, 1990, and June 6, 1990, the district court dismissed petitioner's complaint in its entirety.

In the first order, the court dismissed all of petitioner's claims against the Chairman of the EEOC, and it also dismissed the claims against HHS that

alleged improper processing. Pet. App. A13-A22. The court held that "Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints." *Id.* at A16.

In its subsequent order, the court dismissed petitioner's remaining claims against HHS on the ground that they were barred by *res judicata*. Pet. App. A8-A12. The court determined that, in the present case, petitioner "assert[ed] the same causes of action and ma[d]e the same factual allegations" as she had advanced in a prior action against HHS, *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.). Pet. App. A11. That action, the court noted, ended in a judgment against petitioner following a two-day trial. *Ibid.* Because petitioner had "ma[d]e no attempt [in this case] to *articulate* the facts or legal theories which [petitioner] vaguely assert[ed] [were] 'distinct' from those in the 1988 action," the court concluded that "*res judicata* bars the instant lawsuit." *Id.* at A12.

5. The court of appeals summarily affirmed in an unpublished order. Pet. App. A5-A7.

ARGUMENT

Petitioner does not challenge the determination by both courts below that her claims of employment discrimination by HHS are barred by *res judicata*. Instead, petitioner renews her contention (Pet. 15-27) that HHS and the EEOC improperly processed her discrimination complaints. She also contends (Pet. 27-39) that the courts below erred in holding that Title VII does not create a private cause of action for improper processing. These contentions do not warrant further review.

1. Petitioner's improper-processing claims were correctly rejected. Those claims consisted almost entirely of vague, conclusory allegations of unjust treatment. Petitioner repeatedly failed to identify specific instances of improper treatment, despite opportunities to do so. See Pet. App. A30, A52-A53. The district court correctly concluded that petitioner did not "articulate [any] facts or legal theories" to distinguish petitioner's "vague[]" allegations in the present case from the allegations that she has made on previous occasions. *Id.* at A12 (emphasis omitted).²

The only specific instance of allegedly improper processing that petitioner cites in this Court lacks merit. Petitioner contends that HHS erred when, for purposes of its decision, it consolidated under one heading several allegations that were listed separately in her administrative complaint. Pet. 18-20.

² Indeed, it appears that most, if not all, of petitioner's improper-processing claims are barred by *res judicata*. The district court in the present case found that in *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.), petitioner asserted "[improper] processing of her administrative complaint during the 1978-1986 time period." Pet. App. A11. The court determined that these and the other allegations in petitioner's previous action against HHS were the same as the allegations in the present case. *Ibid.* Petitioner's submission to this Court confirms the district court's determination. Petitioner states that "the immediate basis" for the complaint in the present case "was [HHS's] improper consolidation and rejection of certain issues in [administrative] complaints SSA-102-86 and SSA-366-86." Pet. 30. Petitioner then states that her prior action, *Young v. Secretary of Department of Health & Human Services*, No. 88-0004 (D.D.C.), was likewise "brought to appeal [HHS's] improper consolidation and rejection of certain issues in these two complaints [*i.e.*, administrative complaints SSA-102-86 and SSA-366-86]." Pet. 30 n.10.

Petitioner does not, however, cite any regulation (and we are aware of none) that required HHS to quote petitioner's allegations *verbatim*. HHS fairly summarized the substance of all of petitioner's allegations in its opinion. Compare Pet. App. A45 ("Issue/Allegation No. 11") with *id.* at A56-A58. HHS also clearly explained why it rejected those allegations. See *id.* at A38-A47.

2. Petitioner contends that instances of improper processing should be treated as separate acts of discriminatory treatment under Title VII. Pet. 27-39. The district court, however, correctly concluded that "Title VII creates only a cause of action for discrimination. It does not create an independent cause of action for the mishandling of an employee's discrimination complaints." Pet. App. A16. As the court recognized, while improper processing of an employee's complaint may in some cases furnish evidence of an employing agency's discriminatory motive, it cannot provide the basis for an independent claim against the employing agency. *Id.* at A16 n.2. That is because "[t]he only right [Title VII] establishes is the right to be free of discrimination. This interest is wholly preserved, even if the [agency] errs in its processing of the charge, by the right to a trial *de novo*." *Id.* at A16-A17 (quoting *Hall v. EEOC*, 456 F. Supp. 695, 700 (N.D. Cal. 1978)). Accord *Mackey v. Sullivan*, 55 Fair Empl. Prac. Cas. (BNA) 1134, 1135 (D.D.C. 1991).

For similar reasons, the district court correctly held that Title VII did not provide petitioner with a cause of action against the EEOC for its allegedly improper processing of her discrimination charges.³

When a Title VII plaintiff believes that the EEOC has failed to vindicate her right to be free of employment discrimination, the remedy is to bring a civil action directly against the employer. "Implying a cause of action against the EEOC [would contradict] this policy of individual enforcement * * * and could dissipate the limited resources of the Commission in fruitless litigation with charging parties." *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984). For that reason, "[i]t is settled law * * * that Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge." *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984). Accord, e.g., *Francis-Sobel v. University of Maine*, 597 F.2d 15, 18 (1st Cir.), cert. denied, 444 U.S. 949 (1979); *Georator Corp. v. EEOC*, 592 F.2d 765, 768 (4th Cir. 1979); *Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978) (per curiam), cert. denied, 440 U.S. 921 (1979).

³ Petitioner has not named the EEOC or its Chairman in her petition. The Chairman was, however, a party in the courts below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

MARLEIGH D. DOVER
FRED P. PHILLIPS IV
Attorneys

FEBRUARY 1992